



## **FEDERAL MEDIATION AND CONCILIATION SERVICE**

### **29 CFR Part 1401**

### **RIN 3076-AA13**

### **Production or Disclosure of Information**

**AGENCY:** Federal Mediation and Conciliation Service.

**ACTION:** Final rule.

**SUMMARY:** The Federal Mediation and Conciliation Service (FMCS) issues a final rule amending its existing regulations under the Freedom of Information Act (“FOIA”) to reflect amendments to the FOIA by the Freedom of Information Improvement Act of 2016 (the “FOIA Improvement Act”).

**DATES:** This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Alisa Silverman, Attorney-Advisor, Office of General Counsel, Federal Mediation and Conciliation Service, 250 E St SW, Washington, DC 20427; Office/Fax/Mobile 202-606-5488; [asilverman@fmcs.gov](mailto:asilverman@fmcs.gov).

### **SUPPLEMENTARY INFORMATION:**

#### **I. Background:**

The FOIA was enacted to give the public a right to access records held by the executive branch that, although not classified, were not otherwise available to them. Since its enactment in 1966, the FOIA has been amended on a number of occasions to adapt to the times and changing priorities. On June 30, 2016, President Obama signed the Freedom of Information (“FOIA”) Improvement Act of 2016 (the “FOIA Improvement

Act”). Among other things, the FOIA Improvement Act requires that agencies (i) make records that have been both released previously and requested three or more times available to the public in electronic format, (ii) establish a minimum of ninety days for requestors to appeal an adverse determination, and (iii) provide, or direct requestors to, dispute resolution services at various times throughout the FIOA process. The FOIA Improvement Act also updates how agencies may charge search duplication and review fees. After undertaking a review of its FOIA regulations in accordance with the FOIA Improvement Act, FMCS is revising its FOIA regulations, 29 CFR part 1401, subpart B, to incorporate the statutory mandates.

## **II. Discussion of Amendments Section by Section**

The following paragraphs describe the specific changes adopted by this rulemaking.

In § 1401.20, FMCS removes the current language to add language that ensures this section is read with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). The added language will also align with the Privacy Act of 1974, 5 U.S.C. 552a, for requests made by individuals.

In § 1401.21, FMCS removes the current language in paragraph (a) to add language to include requirements that will make requests available for public inspection on its website if the information has been requested for 3 or more times and to make the public aware that FMCS has a FOIA Public Liaison that will locate records for a request.

FMCS removes language in paragraph (b) to add language to account for the foreseeable harm threshold standard that gives FMCS the ability to withhold information if FMCS “reasonably foresees” the information would harm interest protected by an exemption or otherwise allowed by law. FMCS removes language in paragraph (c) to add language

regarding partial disclosures, full disclosures, and inextricably intertwined records.

FMCS removes paragraphs (d) and (e) becomes the new paragraph (d).

In § 1401.22, FMCS removes the current language to add the section titled *Requirements for Making Requests*. It adds paragraphs (a)(1), (2), and (3), (b), (c), and (d) to include FMCS' contact information for making requests, requester requirements, requests from requesters seeking information pertaining to another individual, what information should be included in a request and the preferred format, and requester providing contact information for requests.

In § 1401.23, FMCS removes the current language to add the section titled *Responsibility for Responding to Requests*. It adds paragraphs (a), (b), (c) introductory text, (c)(1), (2), and (3), (d), and (e) to include information regarding FMCS' responsibilities in responding to requests.

FMCS adds the following sections in accordance with the 2016 FOIA Improvement Act:

- **§ 1401.24 Timing of responses to requests.**
- **§ 1401.25 Responses to requests.**
- **§ 1401.26 Confidential commercial information ("CCI").**
- **§ 1401.27 Appeals.**
- **§ 1401.28 Preservation of records.**
- **§ 1401.29 Fees.**

In § 1401.30, FMCS removes the current language to add language that doesn't entitle any person to service or disclosure of any records which a person isn't entitled to under the FOIA.

FMCS removes §§ 1401.31, 1401.32, 1401.33, 1401.34, 1401.35, and 1401.36 because the information in these sections was consolidated into other sections in revised subpart B.

### **III. Rulemaking Procedure**

Under the Administrative Procedures Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B), FMCS finds good cause the waive notice and opportunity for comment on the amendments. Notice and opportunity for comment are unnecessary, because the FMCS is issuing this final rule for the limited purpose of complying with specific direction in the Act requiring agencies to update their FOIA regulations in accordance with the Act, and the final rule updates FMCS regulations only as necessary to bring them into compliance with the Act.

### **IV. Plain Writing**

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. FMCS has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, “Plain language in Government Writing,” published June 10, 1998 (62 FR 31883).

### **V. National Environmental Policy Act**

FMCS has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

### **VI. Paperwork Reduction Act**

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 33501 *et seq.*) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

## **VII. Congressional Review Act**

This final rule is a rule defined in the Congressional Review Act (5 U.S.C. 801-808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

### **List of Subjects in 29 CFR Part 1401**

Administrative practice and procedure, Fees, Freedom of information, Privacy.

For the reasons discussed in the preamble, and under the authority 29 U.S.C 172 of the Taft Harley Act of 1947 and the FOIA Improvement Act, FMCS amends 29 CFR part 1401 as follows:

### **PART 1401 - PUBLIC INFORMATION**

1. The authority citation for part 1401 continues to read as follows:

**Authority:** Sec. 202, 61 Stat. 136, as amended; 5 U.S.C. 552.

2. Revise subpart B to read as follows:

#### **Subpart B-Production or Disclosure of Information**

**Sec.**

**1401.20 Purpose and scope.**

**1401.21 Proactive disclosures and other disclosure requirements.**

**1401.22 Requirements for making requests.**

**1401.23 Responsibility for responding to requests.**

**1401.24 Timing of responses to requests.**

**1401.25 Responses to requests.**

**1401.26 Confidential commercial information (“CCI”).**

**1401.27 Appeals.**

**1401.28 Preservation of records.**

**1401.29 Fees.**

**1401.30 Other rights and services.**

**§ 1401.20 Purpose and scope.**

This subpart contains the rules that the Federal Mediation and Conciliation Service (“FMCS” or “the Agency”) follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. The regulations in this subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with Privacy Act criteria as well as under this subpart.

**§ 1401.21 Proactive disclosures and other disclosure requirements.**

(a) The FMCS will make available for public inspection in an electronic format on the Agency’s website any record that has been requested 3 or more times. The Agency has a FOIA Public Liaison who can assist individuals in locating records particular to an agency. The FMCS FOIA Public Liaison’s contact information is available on the FMCS FOIA webpage ([www.fmcs.gov/foia](http://www.fmcs.gov/foia)).

(b) The FMCS will withhold information under FOIA only if the Agency “reasonably foresees” that disclosure would harm an interest protected by an exemption or as otherwise allowed by law.

(c) Partial disclosures are appropriate for use by the FMCS when full disclosure is inappropriate or impossible. If a record contains both disclosable and exempt information, the exempt information will be redacted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not possible to separate them. Records disclosed in part shall be marked or annotated to show both the amount and the location of the information redacted and the applicable exemption.

(d) All existing FMCS records are subject to disposition according to Agency record retention schedules and the General Records Schedules promulgated by the National Archives and Records Administration.

**§ 1401.22 Requirements for making requests.**

(a) *General information.* (1) A requester can submit requests through one of the following ways: submitting a request through the public portal on the FMCS FOIA website; sending an electronic request to the Office of General Counsel, [foia@fmcs.gov](mailto:foia@fmcs.gov); or writing directly to the FMCS FOIA office at 250 E Street, SW, Washington, DC 20427. Any additional requirements for submitting a request to the Agency are listed in paragraphs (a)(2) and (3) of this section and in the submitted form available by selecting “FOIA” at the bottom of the FMCS website [www.fmcs.gov/foia](http://www.fmcs.gov/foia).

(2) A requester who is making a request for records about the requester must comply with the verification of identity requirements as determined by the FMCS to include providing documentation and completing a verification of identity form.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Agency can require a requester to supply additional information, if necessary, to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may

help the Agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting requests, requesters may contact the Agency's FOIA Public Liaison, as identified at [www.fmcs.gov/foia](http://www.fmcs.gov/foia), to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the FMCS determines that it does not reasonably describe the records sought, the FMCS will inform the requester what additional information is needed or why the request is otherwise insufficient. If a request does not reasonably describe the records sought, the FMCS's response to the request may be delayed.

(c) *Format for requests.* Requests may specify the preferred form or format (including electronic formats) for the records. The FMCS will accommodate the request if the record is readily reproducible in that form or format.

(d) *Content of requests.* Requesters must provide contact information, such as their full name, organization, phone number, email address, and/or mailing address, to assist the Agency in communicating with them and providing released records.

#### **§ 1401.23 Responsibility for responding to requests.**

(a) *In general.* Where the FMCS first receives a request for a record and maintains that record, it is responsible for responding to the request. In determining which records are responsive to a request, the Agency ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Agency must inform the requester of that date. If the FMCS uses any other date due to needing to clarify the request or obtain a fee agreement, it must inform the requester of that date. A record that is excluded from the requirements of the FOIA, pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.



(b) *Authority to grant or deny requests.* The Director of FMCS or designee is authorized to grant or to deny any requests for records that are maintained by the Agency.

(c) *Consultation, referral, and coordination.* When reviewing records in response to a request, the Agency will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the Agency must proceed in one of the following ways:

(1) *Consultation.* When records originated with the agency processing the request but contain information of interest to another agency or other Federal Government office, the FMCS will generally consult with that other entity prior to making a release determination.

(2) *Referral.* (i) Ordinarily, when the FMCS is the originating agency, it is presumed to be in the best position to make the disclosure determination. When the FMCS believes that a different agency is best able to determine whether to disclose the record, the FMCS typically will request the other agency make the final response to the requester.

(ii) Whenever the FMCS refers any part of the responsibility for responding to a request to another agency, it will document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure in paragraph (c)(2) of this section will not be followed where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In

such instances, FMCS would coordinate with the originating agency to seek its views on whether the records should be exempt from disclosure. FMCS will issue the final response to the requester.

(d) *Classified information.* On receipt of any request involving classified information, the FMCS will determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, FMCS must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever the FMCS's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the FMCS must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the FMCS will be handled according to the date that the first agency received the perfected FOIA request.

#### **§ 1401.24 Timing of responses to requests.**

(a) *In general.* The FMCS ordinarily will respond to requests according to their order of receipt. A request may be made directly to the FMCS by referring to procedures described on [www.fmcs.gov](http://www.fmcs.gov) or by email to [foia@fmcs.gov](mailto:foia@fmcs.gov).

(b) *Timing of response.* The obligation to respond to a request for records arises on the first business day when the request is received by the Office of General Counsel.

(c) *Multi-track processing.* FMCS designates a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. FMCS may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors an agency may consider are the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. FMCS must advise requesters of the track into which their request falls and, when appropriate, should offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(d) *Unusual circumstances.* Whenever the FMCS cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the FMCS extends the time limit on that basis, the FMCS must, before expiration of the 20-day response period, notify the requester in writing of the unusual circumstances involved and of the date by which the Agency estimates it will complete processing of the request. Where the extension exceeds 10 working days, the FMCS will provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The FMCS will make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The name and contact information for the FMCS’s FOIA Public Liaison is available at [www.fmcs.gov](http://www.fmcs.gov) by selecting FOIA at the bottom of the screen. FMCS will also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services. Whenever the FMCS extends the time limits by more than ten additional working days, the FMCS must notify the requester of the right to seek dispute resolution services from the Office of the Government Information Services (OGIS).

(e) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, agencies may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Agencies cannot aggregate multiple requests that involve unrelated matters.

(f) *Expedited processing.* (1) The Agency will process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information.

(2) A request for expedited processing may be made at any time. When making a request for expedited processing of an administrative appeal, the request should be submitted to the FMCS's Office of the Director via [foia@fmcs.gov](mailto:foia@fmcs.gov) or through the online portal located at [www.fmcs.gov/foia](http://www.fmcs.gov/foia).

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (c) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request — one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing

the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, the FMCS may waive the formal certification requirement in this paragraph (f)(3).

(4) The FMCS must notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, the FMCS must act on any appeal of that decision expeditiously.

#### **§ 1401.25 Responses to requests.**

(a) *In general.* To the extent practicable, the FMCS will communicate electronically with requesters.

(b) *Acknowledgments of requests.* The FMCS will acknowledge a request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process.

(c) *Estimated dates of completion and interim responses.* Upon request, the Agency will provide an estimated date by which it expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the FMCS may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests (fees).* Once the Agency determines it will grant a request in full or in part, it will notify the requester in writing. The Agency will also inform the requester of any fees charged under § 1401.30 and will disclose the requested records to

the requester promptly upon payment of any applicable fees. The Agency will inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the Agency makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial must be signed by the head of the Agency or designee and must include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the Agency in denying the request;
- (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;
- (4) A statement that the denial may be appealed under § 1401.27, and a description of the appeal requirements; and

(5) A statement notifying the requester of the assistance available from the Agency's FOIA Public Liaison, and the dispute resolution services offered by Office of Government Information Services.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information redacted and the exemption under which the redaction was made unless doing so would harm an interest protected by an applicable exemption. The location of the information redacted must also be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event the FMCS identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the Agency will confer with Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

(2) In the event the FMCS applies an exclusion, it will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

#### **§ 1401.26 Confidential commercial information (“CCI”).**

(a) *Definitions.* For purposes of this section:

*Confidential commercial information* means information obtained by the FMCS from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

*Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The FMCS will promptly notify the submitter in writing whenever such confidential commercial information is requested under the FOIA and the Agency determines that it may be required to disclose the information, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The FMCS has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet made that determination.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the Agency may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Agency determines that the information is exempt under the FOIA, or the information has been lawfully published or has been officially made available to the public;



(2) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(3) The designation made by the submitter appears obviously frivolous.

(e) *Opportunity to object to disclosure.* (1) The FMCS must specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (c) of this section.

(2) If a submitter has any objections to disclosure, it should provide the Agency a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as the basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The FMCS is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Agency must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the FMCS decides to disclose information over the objection of a submitter, it must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the Agency intends to release them; and

(3) A specified disclosure date, which must be within a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Agency must promptly notify the submitter.

(i) *Requester notification.* The Agency must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

#### **§ 1401.27 Appeals.**

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the Agency's Deputy Director, FOIA Appeal, Federal Mediation and Conciliation Service, 250 E Street, SW, Washington, DC 20427; foia@fmcs.gov.

Requesters can submit appeals by mail, email, or via the online portal at [www.fmcs.gov/foia](http://www.fmcs.gov/foia). The requester must make the appeal in writing, clearly identifying the grounds therefore and providing any supporting documentation. To be considered timely it must be postmarked or, in the case of electronic submissions, transmitted within 90 calendar days after the date of the response. The appeal should clearly identify the determination that is being appealed and the assigned request number, if known. To

facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, “Freedom of Information Act Appeal.”

(b) *Adjudication of appeals.* An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(c) *Decisions on appeals.* The Deputy Director of the FMCS or designee will provide a decision on an appeal. A decision that upholds the FMCS’s determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the dispute resolution services offered by the OGIS as a non-exclusive alternative to litigation. If the decision is remanded or modified on appeal, the Deputy Director will notify the requester of that determination in writing. The Office of General Counsel will then further process the request in accordance with that appeal determination and will respond directly to the requester. Alternatively, the Deputy Director may decide to modify the decision and decide the appeal on its merits in a single step.

(d) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If the Agency agrees to participate in the dispute resolution services provided by OGIS, the Deputy Director or designee will participate on behalf of the FMCS.

(e) *When appeal is required.* Before seeking review by a court of the Agency’s adverse determination, a requester generally must first submit a timely administrative appeal.

#### **§ 1401.28 Preservation of records.**

The FMCS must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until final disposition of the “request” case: no sooner than 91 days after the final response is sent to the requester to allow for a timely appeal. The Agency must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

**§ 1401.29 Fees.**

(a) *In general.* (1) The FMCS will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters:

(i) Commercial use requesters;

(ii) Non-commercial scientific or educational institutions or news media requesters; and

(iii) All other requesters.

(2) Different fees are assessed depending on the category. Requesters may seek a fee waiver. The Agency will consider requests for fee waivers in accordance with the requirements in subsection (k) of the FOIA. To resolve any fee issues that arise under this section, the FMCS may contact a requester for additional information. The Agency is to conduct searches, review, and duplication in an efficient and cost-effective manner. The FMCS ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by the Agency.

(b) *Definitions.* For purposes of this section:

*Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The FMCS's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The Agency will notify requesters of their placement in this category.

*Direct costs* are those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

*Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

*Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution. The FMCS may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

*Noncommercial scientific institution* is an institution that is not operated on a "commercial" basis, as defined in this paragraph (b) and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the

request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The FMCS will advise requesters of their placement in this category.

*Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals that disseminate news and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. Freelance journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected. However, the Agency can also consider a requester’s past publication record in making this determination. The Agency will advise requesters of their placement in this category.

*Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter

under § 1401.26, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

*Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Agency will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided in paragraphs (c)(1) through (3) of this section already account for the direct costs associated with a given fee type, the FMCS will not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The FMCS will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Agency may properly charge for time spent searching even if it does not locate any responsive records or if the Agency determines that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows:

(A) The Agency will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The Agency will notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(B) For requests that require the retrieval of records stored by the Agency at a Federal records center operated by the National Archives and Records Administration (NARA), the Agency will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* The FMCS will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The Agency must honor a requester's preference for receiving a record in a particular form or format where the Agency can readily reproduce it in the form or format requested. Where photocopies are supplied, the Agency will provide one copy per request at cost (\$0.05 per page). For copies of records produced on tapes, disks, or other media, the FMCS will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the Agency will charge the direct costs.

(3) *Review.* The Agency will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, i.e., the review conducted to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the Agency's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When the FMCS determines that a requester is an educational institution, non-commercial scientific institution, or representative of



the news media, and the records are not sought for commercial use, it will not charge search fees.

(2) FMCS cannot charge fees:

(i) If the Agency fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If the Agency has determined that unusual circumstances as defined by the FOIA apply and the Agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If the Agency has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Agency may charge search fees or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The Agency must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA, and the Agency must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. 552(a)(6), (B)(ii). If the exception in this paragraph (d)(2)(iii) is satisfied, the Agency may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, the FMCS will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.00.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When the FMCS determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the Agency must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the Agency will advise the requester accordingly. If the request is for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and the notice will advise the requester whether those entitlements have been provided.

(2) If the Agency notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided

by the statutory entitlements. The requester must provide the commitment or designation in writing and must, when applicable, designate an exact dollar amount the requester is willing to pay. The FMCS is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Agency estimates that the total fee will exceed that amount, the Agency will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Agency will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The FMCS will make available its FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the Agency chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The Agency may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the Agency. The Agency will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset (see 29 CFR part 1450).

(h) *Aggregating requests.* When the FMCS reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the Agency will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraph (i)(2) or (3) of this section, the Agency cannot require the requester to make an advance payment before work on a request starts or continues. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When the Agency determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The Agency may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the Agency within 30 calendar days of the billing date, the Agency may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Agency may require that the requester make an advance payment of the full amount of any anticipated fee before the Agency begins to process a new request or continues to process a pending request or any pending appeal. Where the Agency has a reasonable

basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the Agency requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Agency's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Agency must inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The Agency must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The FMCS will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the Agency will consider the following criteria:

(A) The FMCS must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Agency must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The Agency ordinarily will presume that when a news media requester has

satisfied paragraphs (k)(2)(i) and (ii), the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Agency and should address the criteria referenced in paragraphs (k)(1) and (2) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

#### **§ 1401.30 Other rights and services.**

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

**Dated:** September 10, 2021.

**Sarah Cudahy,**

*General Counsel.*

[FR Doc. 2021-19906 Filed: 9/27/2021 8:45 am; Publication Date: 9/28/2021]